UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

International Union of Operating Engineers, Local 150, AFL-CIO,	)	
Charged Party,	)	Case No. 25-CD-178156
and	)	
Jack Gray Transport, Inc., d/b/a Lakes & Rivers Transfer Co.,	)	
Charging Party,	)	
and	)	
International Longshoreman's Association Local 1969,	)	
Party-in-Interest.	)	

LOCAL 150's POST-HEARING BRIEF

STATEMENT OF THE CASE

On or about June 13, 2016, Jack Gray Transport, Inc., d/b/a Lakes & Rivers Transfer ("Lakes & Rivers"), filed an unfair labor practice charge with the National Labor Relations Board, Region 25, alleging that the International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150"), violated Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), of the National Labor Relations Act (the "Act"). The Regional Director found merit to the charge. On or about June 20, 2016, Region 25 issued a Notice of Hearing.

On June 28, 2016, Region 25 conducted a hearing pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k). The International Longshoreman's Association, Local 1969 ("ILA"), participated in the hearing as a Party-in-Interest. Post-hearing briefs originally were scheduled to be due on July 5, 2016. On June 29, 2016, the parties filed a Joint Request for Extension of Time

to File Post-Hearing Briefs. On July 1, 2016, the Board granted the Motion and extended the submission date to July 15, 2016. Local 150 now files this brief in support of its position that the Board should award the disputed work to Local 150.

DISPUTED WORK

At the hearing, the parties modified the description of disputed work set forth in the Notice of Hearing (Tr. 8-9). The "work in dispute" in this proceeding is: the operation of any hydraulic material handler for Jack Gray Transport, Inc. d/b/a Lakes & Rivers Transfer at its Port of Indiana-Burns Harbor location (Stipulation ¶ 5).

STATEMENT OF FACTS

Local 150 and the ILA are labor organizations as that term is defined in Section 2(5) of the Act, 29 U.S.C. § 152(2) (Stipulation ¶ 4). Lakes & Rivers is a statutory employer (Stipulation ¶ 3) and is signatory to a collective bargaining agreement with Local 150 (Local 150 Ex. 1); the Company is also signatory to a CBA with the ILA (ILA Ex. 3). Lakes & Rivers loads and unloads ships and barges at the Port of Indiana (also known as Burns Harbor) located in Portage, Indiana (Tr. 27). Local 150 members have always operated the land-based cranes for loading and unloading ships and barges (*id.*). Some ships, particularly the newer ships, have on-board cranes (Tr. 26). Longshoremen have operated the ship-based cranes, as well as other miscellaneous equipment such as forklifts and bobcats (Tr. 156).

Over the course of the last ten years, hydraulic material handlers have become more prominent on the docks (Tr. 30). Material handlers run on rubber tires or steel tracks and therefore are more mobile than traditional lattice boom cranes (Tr. 28; Local 150 Ex. 2, 11). The material handlers operate hydraulically, are equipped with various-sized buckets, and are used to load and

unload barges and more materials on the dock (Tr. 29; Local 150 Exs. 2, 7, 9, 11; ILA Ex. 2). A material handler can do 80 percent of the work of a crane (Tr. 33).

Eight months ago, representatives of Lakes & Rivers decided to incorporate material handlers into the Company's operations based, in part, on the state of its aging cranes: the Company currently has two lattice boom cranes that are operational and one lattice boom crane in need of repair (Tr. 32, 38). Ultimately, the Company decided it could become "more efficient, cost-effective and cut [its] maintenance costs" if it began using a material handler (Tr. 32).

Lakes & Rivers borrowed a material handler from one of its customers—with the understanding that Lakes & Rivers would "get it up and running" (Tr. 34). Lakes & Rivers spent between $5,000 and $10,000 to get the material handler to its dock at the Port of Indiana (Tr. 34). The material handler was fully maintained and put together by Frank's Equipment Company (Tr. 53). Incidentally, Local 150 represents the mechanic employed by Frank's Equipment Company who serviced the material handler at issue in this case (*id.*). The Company plans to use the material handler to unload some barges scheduled to arrive at the dock in August of 2016. If the borrowed material handler works as anticipated, the Company is considering purchasing a new material handler at an estimated price of $1.2 million (Tr. 35).

Before the material handler arrived at the dock, representatives of the Company met with representatives from both unions, Local 150 and the ILA, to discuss the eventual work assignment. At these meetings, representatives of the Company observed that the ILA had a lower contract wage rate, but ultimately concluded it would be more economical and efficient to assign the work to Local 150. Accordingly, Lakes & Rivers has assigned the operation of the hydraulic material handler at its Port of Indiana jobsite to members of Local 150. On or about April 8, 2016, a Company representative directed a Local 150 member to move the crane down the dock (Tr. 36).

That prompted the ILA to file a grievance (ILA Ex. 7). Local 150 responded by advising the Company that it would "engage in any and all means, including picketing, to enforce and preserve its work assignment" (Employer Ex. A).

ARGUMENT

The Board must proceed with a determination of the dispute pursuant to Section 10(k) of the Act if: (1) there are competing claims for the work in question; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and, (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Laborers' Int'l Union of North America, Local 113 (Super Excavators, Inc.)*, 327 NLRB 113, 114 (1998). In this case, the parties have stipulated that all three elements are satisfied (Stipulation ¶¶8, 9, 10) and in so doing have consented to the Board's jurisdiction to make an affirmative award of the disputed work. For the reasons explained below, Local 150 respectfully requests that the Board award the disputed work to Local 150.

I. The Board Should Award the Disputed Work to Local 150.

Section 10(k) requires the Board to make an affirmative award of disputed work after giving due consideration to various factors. *Ironworkers Local 380 (Stobeck Masonry, Inc.)*, 267 NLRB 184 (1983). The Board's determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Construction and General Laborers District Council of Chicago and Vicinity, Local 1006 (Central Blacktop Co., Inc.)*, 292 NLRB 57 (1988).

A. Employer Preference and Past Practice Favor an Award to Local 150 and Local 703.

The Board normally accords employer preference considerable weight. *Stobeck Masonry, Inc.*, 267 NLRB at 287, fn. 8. Accordingly, the Board will make an award to the union-represented employees to whom the employer prefers to assign, and has in the past assigned, the disputed work. *Machinists Lodge 776 (Lockheed Martin)*, 352 NLRB 402 (2008); *see also IUOE, Local 150 (All American)*, 296 NLRB 933, 936 (1989); *Machinists, Lodge 837 (McDonnell Douglass Corp.)*, 242 NLRB 913 (1979).

Historically, Lakes & Rivers assigned the operation of all land-based cranes to Local 150 (Tr. 27). As explained above, faced with an aging fleet of cranes, the Company is exploring the idea of using material handlers to perform some or all of the work it had previously performed using land-based cranes (Tr. 32). In other words, the Company intends to use the material handler to perform the same work Local 150 members have historically performed for the Company using land-based cranes. Bryan Ryberg is a consultant for Jack Gray; his job is to manage the operations for Lakes & Rivers at the Port of Indiana (Tr. 12-13). At the hearing, Ryberg testified that the Company prefers to have Local 150 members operate the material handlers (Tr. 35, 48, 59, 64).

Ryberg made the decision to assign the work to Local 150 (Tr. 35). In making the decision, Ryberg explained that he considered a number of factors, including safety and efficiency (Tr. 40, 48-9). Based on his review of the relevant factors, Ryberg concluded that it was more economically efficient to assign the work to Local 150 than it would be to assign the work to the ILA (Tr. 49-50). Ryberg testified that his stated preference for Local 150 is consistent with the Company's profit-maximizing objective (Tr. 49). Based on a long line of Board cases, the Company's preference is dispositive. The Board should affirm the Company's preference and make an affirmative award of the work to Local 150.

The ILA attempts to minimize the significance of the Employer's preference by arguing the Company initially indicated that it was going to assign the work to the ILA and that the Company's eventual decision to assign the work to Local 150 was based on a threat letter it received from Local 150. There are several problems with this argument. First, as explained above, the Company's decision to assign the work to Local 150 was driven largely, if not entirely, by its desire to maximize profits. Second, the presence of a strike threat does not diminish the significance of an employer's stated preference. Every reported 10(k) decision in which the Board has made an affirmative award of the work contained evidence of a picket or a threat to picket in violation of Section 8(b)(4)(D). There is *no* authority for the proposition the Board may not make an award of work to a union that obtained a work assignment by making a threat to picket. To the contrary, the Board has awarded work to a union that obtained the initial assignment by threating to picket. For example, in *Sign Painters, Decorators and Paintmakers Union No. 756 (Heritage Display Group of Dallas, Inc.)*, 306 NLRB 818 (1992), the company assigned the disputed work to the Carpenters. The Decorators protested the assignment and threatened to picket. *Id*. Based on the threat, the employer removed the Carpenters from the job and assigned the work to the decorators and, notably, did not "express[] a clear-cut preference for either group of employees." *Id*. On this record, the Board concluded the factor "preference, current assignment and past practice" favored an award to the Decorators. *Id*.

In this case, the Employer has never formally assigned the material handler to the ILA and Ryberg repeatedly stated the Company's clear preference to have Local 150 perform the work in dispute. Moreover, Ryberg explained that his ultimate decision was more grounded in economics than anything else. Even assuming Local 150's threat to picket, filed in response to the ILA's

grievance, influenced the Company's decision, the threat does not diminish the Company's stated preference to continue to have Local 150 members operate the material handler.

Finally, the ILA is not as pure as it might have the Board believe. On cross-examination, Ryberg was asked by counsel for Local 150 if the Company received any threats from the ILA (Tr. 66). Ryberg refused to answer the question (Tr. 67). As Ryberg explained it, he was comfortable discussing threats related to contractual issues and the grievance, but "[t]he other stuff, I don't want to talk about it" (Tr. 67). He explained that he did not want to answer the question about threats the Company received from the ILA because he did not "want to start any animosity" (*id.*). Because Local 150 appreciates the position the Company finds itself in, counsel for Local 150 did not request the Hearing Officer to direct Ryberg to answer the question. Nevertheless, one can only imagine the nature of the threat the Company received from the ILA. The Employer preference factor favors an award of the work to Local 150.

B. Collective Bargaining Agreements Favor an Award to Local 150.

When all the competing unions have collective bargaining agreements with the employer, the Board applies a comparative analysis to determine what weight, if any, should be given to this factor. *Machinists District No. 10 (Ken Thelen Co.)*, 264 NLRB 1356 (1982). If one contract contains greater specificity concerning the right to perform the disputed work, or more precisely covers the work, an assignment to the employees covered by the more specific contract is favored. *Machinists Lodge Local 681 (Brown and Williamson Tobacco Corp.)*, 242 NLRB 22 (1979) (one contract "more specifically pertains" to the work); *Mineworkers Local 2117 (Codell Construction Co.)*, 235 NLRB 1134 (1978) (one contract is "sufficiently broad to encompass" the work, but the other contract "specifically covers" the work.). In other words, "the specific is favored over the general." *Construction & General Laborers' District Council of Chicago and Vicinity (Henkels*

& McCoy), 360 NLRB No. 102 (2001), *quoting Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB 157, 159 (2001).

In this case, Local 150's CBA makes *specific* reference to the material handler at Article XXXX, Group II Base Wages (See Local 150 Ex. 1, p. 16). The material handler is specifically identified in Local 150's CBA with a corresponding hourly wage rate of $37.50 (*id.*). In his opening statement, counsel for the ILA stated "that the equipment [i.e. material handler] is more clearly covered under the Local 1969 Collective Bargaining Agreement than under the Local 150 agreement" (Tr. 11). That is not accurate. At the hearing, Donald Snyder, Business Agent for the ILA, was handed a copy of the ILA's collective bargaining agreement and after reviewing the contract for several minutes had to concede that he could not find the material handler in the contract (Tr. 168; 179). The ILA's contract does not cover the material handler. Even assuming the ILA's contract covers the work in some broad sense, Local 150's specifically covers the work in question. Under Board law, this factor favors an award of the work to Local 150 since Local 150's contract more specifically covers the work in question.

C. Economy and Efficiency Favor an Award to Local 150 and Local 703.

The Board favors assignments that promote the efficient and economical performance of the work. *Electrical Workers Local 222 (KTVU)*, 272 NLRB 648 (1984). As explained above, Company representative Ryberg assigned the work to Local 150 because he concluded that was the most economically efficient work assignment (Tr. 49-50).

At the hearing, the ILA questioned witnesses presumably to set up an argument that its members should be awarded the work because the ILA contract wage rate is lower than Local 150's contract wage rate. There are several problems with this argument. First, the Board has long held that wage differentials do not constitute a proper basis for awarding disputed work. *International Longshoremen's Assoc. (Rail Distribution Center, Inc.)*, 310 NLRB 1, f. 4 (1993);

International Brotherhood of Painters, Local 91 (Frank M. Burson, Inc.), 265 NLRB 1685, 1687 (1982); *Stage Employees Local 1 IATSE (American Broadcasting Co.)*, 249 NLRB 1090, 1093 (1980). Counsel for Local 150 objected to the ILA's questioning on this basis (Tr. 20). Second, as explained above, the ILA contract does not specifically cover the material handler, nor is there any evidence in the record that ILA members have ever been compensated by Lakes & Rivers pursuant to the ILA contract for operating a material handler. Therefore, any discussion about wage comparisons is lacks foundation and is therefore speculative.

Finally, to the extent wage comparisons are relevant, the relevant comparison is found in the Local 150 CBA between the wage for a crane operator ($44.50) and a wage for the material handler ($37.50) (*see* Local 150 Ex. 1, p. 16). As explained above, the Company wants to use material handlers to perform work previously done with cranes. The Company negotiated a new classification and a new wage rate in its most recent contract with Local 150 (Tr. 110); notably, Local 150 agreed to $7.00 wage reduction for the new material handler classification (Local 150 Ex. 1). As a result of this Agreement, the Company will be able to perform the same work with a new piece of equipment using the same highly skilled employees at a significantly reduced wage rate. This is an extremely economical and efficient outcome for the Company. The Board should conclude that the economy and efficiency factor favors an award of the work to Local 150.

D. Skills, Safety and Training Favor an Award to Local 150 and Local 703; Training Favors Local 150.

Award of work goes to the union with more formal training. *Henkels & McCoy*, 360 NLRB No. 102. In other words, formal training is preferable to on-the-job training. In this case, Local 150 presented extensive evidence about its training site and the safety and skills training that its members receive (Tr. 88-90; Local 150 Ex. 15, 16). Local 150 has 23,500 members (Tr. 106). As Local 150 Business Agent Jeff Valles explained, everybody "within our local union will utilize

[the] training facility at one time or another" (Tr. 90). Valles further explained that the training site focuses on both safety and training (*id*.). Local 150 also presented the transcripts of Lakes & Rivers' employees Timothy Hansford and David Strayer (Local 150 Exs. 17, 18). These transcripts document the extensive safety and skills training these Local 150 members have received over the years, as well as the certifications received and the exams they have passed.

In contrast, the ILA witnesses conceded that their members receive on-the-job training provided by one of their members, James Dean (Tr. 172, 188, 198-99). This on-the-job training often is subsidized by the Employer (Tr. 199-200). Likely because of the limited training opportunities, the ILA only has eight members who are qualified to run a material handler (Tr. 188). Local 150's 23,500 members have access to and avail themselves of outstanding formal safety and skills training. On-the-job training provided by a senior member of the ILA pales in comparison to the formal opportunities available to Local 150 members. This factor favors and award of the work to Local 150.

E. Area and Industry Practice Favor an Award to Local 150.

Where a majority of employers in the relevant area assign the work to one of the competing groups, that group is favored, even if there are occasional deviations from that norm. *Teamsters Local 79 (Electric Machinery Co.)*, 194 NLRB 898 (1972); *Operating Engineers Local 158 (E.C. Ernst)*, 172 NLRB 1667 (1968). Importantly, the Board is reluctant to disturb an established area practice. *Stobeck Masonry, Inc.*, 267 NLRB 284.

Local 150 members operate material handlers for employers at the Port of Indiana, as well as other ports in south Chicago and northwest Indiana. For example, Phoenix Services uses three material handlers in its operations at the Port of Indiana and has assigned the operation of those material handlers to Local 150 (Tr. 75-76). Phoenix took over operations from Edward C. Levy Corp. at the Port of Indiana (Tr. 77). Prior to Phoenix's arrival, Levy assigned the operation of its

material handlers to Local 150 members at the Port of Indiana (Tr. 74-75; Local 150 Ex. 7). Phoenix Services also has operations at LTV Steel and Inland Steel—Local 150 members operate material handlers for Phoenix Services at those jobsites as well (Tr. 76).

Tube City IMS performs work at the Port of Indiana and at U.S. Steel Gary Works; it utilizes three material handlers at its operations at the Port of Indiana and four material handlers at its operations at U.S. Steel Gary Works (Tr. 80-83). Local 150 members operate all seven material handlers for Tube City IMS at the two work sites (Tr. 81-84; Local 150 Exs. 9, 11).

Tri-River Docks, Inc., operates at Port of Indiana (Burns Harbor), Indiana Harbor, and in Lemont, Illinois (Tr. 124). Tri-River Docs adopted the terms of the Federal Marine Terminals Agreement and works under the terms of that Agreement at Burns Harbor, Indiana Harbor, and in Lemont (Tr. 124; Local 150 Exs. 23, 24). Tri-River Docks has assigned the material handler to Local 150 (Tr. 125).

Tri-River Docks and Central Teaming also are signatory to the Industrial Service Contractors CBA (Tr. 126-27; Local 150 Ex. 25). Central Teaming operates a facility at the Gary, Indiana Steel Mill Strip; it utilizes material handlers to load barges and assigns that work to Local 150 members (Tr. 127).

Beemsterboer Slag Corp. is signatory to a collective bargaining agreement with Local 150 covering its operations on the south side of Chicago, Indiana Harbor, and U.S. Steel (Tr. 85; Local 150 Ex. 12). Beemsterboer utilizes four material handlers at those three sites; Local 150 members operate all four material handlers (Tr. 85-6). Beemsterboer also is signatory to the Northern Illinois Material Producers Agreement ("NIMPA") (Tr. 87; Local 150 Exs. 13, 14). The material handler is covered under NIMPA and Beemsterboer performs work under that Agreement as well (Tr. 88).

Kinder Morgan works on two docks on the south side of Chicago (Tr. 114). Kinder Morgan is signatory to a CBA with Local 150 and has assigned its material handler to Local 150 (*id.*, Local 150 Ex. 19). River Docks, Inc., operates 25 docks in the Midwest (Tr. 115). River Docks, Inc., is signatory to a CBA with Local 150 and has assigned the nine material handlers it uses within Local 150's geographical jurisdiction to Local 150 (Tr. 116-118; Local 150 Exs. 20, 21).

The overwhelming practice in the industry is to assign material handlers to Local 150 members. The Board must not disturb this clear industry practice. *Stobeck Masonry, Inc.*, 267 NLRB 284. The ILA provided one example of one of its members operating a material handler—that was for NLMK at the Port of Indiana. This slight deviation from the normal area practice is not sufficient to warrant an assignment to the ILA. *Electric Machinery Co.*, 194 NLRB 898 (1972). The "area and industry practice" factor favors an award of the work to Local 150.

CONCLUSION

For all the above-stated reasons, Local 150 respectfully requests the Board make an affirmative award of the disputed work to Local 150.

Dated: July 15, 2016

Respectfully submitted,

s/Bryan P. Diemer
One of the Attorneys for the Charged Party

Names and Address of Attorney for Charged Party:
Bryan P. Diemer
International Union of Operating Engineers,
Local 150, AFL-CIO
6200 Joliet Road
Countryside, IL 60525
Ph. 708/579-6654
Fx. 708/588-1647

CERTIFICATE OF SERVICE

The undersigned, an attorney of record, certifies that he caused a copy of the foregoing ***Post-Hearing Brief*** to be served upon:

Patricia K. Nachand, Regional Director
National Labor Relations Board, Region 25
575 North Pennsylvania Street, Suite 238
Indianapolis, IN 46204-1577
patricia.nachand@nlrb.gov

Ms. Rebekah Ramirez, Field Attorney
National Labor Relations Board, Region 25
575 North Pennsylvania Street, Suite 238
Indianapolis, IN 46204-1577
Rebekah.ramirez@nlrb.gov

David G. Huffman-Gottschling
Jacobs Burns Orlove & Hernandez
150 North Michigan Avenue, Suite 1000
Chicago, IL 60601
davidhg@jbosh.com

Colin J. Burns
Jacobs Burns Orlove & Hernandez
150 North Michigan Avenue, Suite 1000
Chicago, IL 60601
colinjburns@jbosh.com

Danette Garza, JD, CAP
Jack Gray Transport, Inc.
4600 East 15th Avenue
Gary, IN 46403
dgarza@jackgray.com

via electronic mail, on or before the hour of 5:00 p.m. this 15th day of July, 2016.

/s/ Bryan P. Diemer
Attorney for Local 150

Name and Address of the Attorney for Local 150:

Bryan P. Diemer
IUOE, Local 150, AFL-CIO
6200 Joliet Road
Countryside, IL 60525
Ph. 708/579-6654; Fx. 708/588-1647